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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. **508**

WOODLAND TERRACE, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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WOODLAND TERRACE, INC., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled cause on August 5, 1961.

OPINION BELOW

The opinion of the court below (Appendix A, *infra,* pp. A1-A10) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B, *infra.* p. A11) was entered on August 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether, by reason of the representations made by the President of the United States and by the Commissioner of the Federal Housing Administration [hereinafter "FHA"], to the effect that mortgage terms on emergency rental housing projects would be adjusted in the event of the anticipated possibility of subsequently diminished occupancy with consequent decline in earning power, representations that were incorporated into FHA regulations and that according to the district court's findings induced petitioner's sponsors to construct emergency rental housing and to execute the mortgage in question, the United States was precluded from foreclosing on the mortgage that it insured and that had been assigned to it, where the FHA as sole preferred stockholder had complete control of the project.

2. Whether, if the FHA was only required to give consideration to a request for readjustment of the mortgage terms, it is shown on this record to have given fair consideration (as distinguished from brusque, inarticulated rejection) of such a request made by petitioner.

3. Whether, since Section 608 of the National Housing Act, under which the present project was financed, incorporates only Section 207(k) and not Section 207(l) of that Act, the United States when foreclosing a mortgage that the FHA insured under Section 608 and later acquired by assignment is entitled to a deficiency judgment against the defaulting mortgagor.

STATUTES, REGULATIONS, AND DIRECTIVES INVOLVED

Many of the statutes, regulations and FHA directives involved are set forth in the printed Appendix used in the court below (R. 184-194, 215-226, 239), nine additional copies of which have been furnished pursuant to Rule 21(4). Additional regulations are set forth in Appendix C to this petition, *infra*, pp. A12-A15.

STATEMENT

This was an action by the United States, as assignee of an insured mortgage under Section 608 of the National Housing Act (12 U.S.C. §1743; R. 222-226), to foreclose on the housing project owned by petitioner. The execution of the mortgage, the fact of default, and the amount due were admitted, but petitioner by its Sixth Defense (R. 17-20) challenged the Government's right to foreclose, and by its Fourth Defense (R. 15-16) challenged in any event the Government's right to a deficiency judgment.

The case was referred to the District Court's Standing Master (R. 22), who after finding the facts recommended rejection of the defenses and entry of a decree of foreclosure plus a deficiency judgment (R. 22-36). His report was confirmed (R. 55-56), and judgment was entered accordingly (R. 57-60). On appeal, the court below once more rejected petitioner's defenses and affirmed.

Petitioner's Sixth Defense (R. 17-20), in substance, was that the Federal Housing Commissioner, acting in the scope of and in furtherance of his authority, induced the petitioner and its sponsors to construct the housing project in question, representing that, if petitioner did so, and the earning capacity of the project in the future proved inadequate to make the payments called for by the mortgage, due to conditions that both parties contemplated might occur, the Commissioner would cause the terms of the mortgage to be altered or reduced commensurate with such decreased earning capacity. Further, that the project's earning capacity is now inadequate to meet the mortgage requirements, and that petitioner has called upon the Commissioner, who is now the owner of the mortgage, to carry out his representations and directives to effectuate such reduction, not in respect of the principal amount, but only to provide smaller payments over a longer term commensurate with the project's present earning capacity.

The facts relevant to the issues thus framed by the pleadings, which were tried at length below, may be summarized as follows:

A. The Government's basic representations and the implementing regulations.

On December 14, 1946, President Truman made a public statement on the 1947 housing program (Def. Ex. 4, Tr. 23-24,[1] R. 144-145, 170-173). The portions of that statement pertinent here are as follows (R. 170-171, 172, 173):

> "I am determined that a vigorous housing program will continue to be carried out in 1947. • • •
>
> "The main point of emphasis for 1947 is rental housing. Within the total number of homes to be built, it is of major importance that a maximum number of rental units be provided. We are planning financing and other aids that will encourage builders to produce units for rent. • • •
>
> "More family units must be made available for rent to veterans. They should not be compelled to buy in order to get shelter. • • • We also plan a number of financial measures that will encourage the construction of rental housing. • • •
>
> "To provide assurance of continued insured mortgage financing to builders who are planning rental housing, I am making available to the Federal Housing Administration the second billion dollars of Title VI insurance authorization provided for in the Patman Act. This is to be used primarily for rental housing, together with the largest possible share of the first billion dollars directly authorized by Congress. Congress will be asked to advance the termination date of Title VI insured financing authority at least for rental housing, for a period sufficient to accomplish this objective. • • •

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[1] "Tr." refers to those portions of the transcript of testimony before the Master that were not printed in the Appendix, the latter being designated simply as "R." The entire unprinted record is on file with the Clerk.

"To reduce monthly payments and to make possible lower rents, the FHA will extend the term of amortization in its Title VI rental housing commitments beyond the usual 28 years, the amount of extension to be appropriate for the project proposed.

"*To guard against the possibility of lesser earnings of housing projects after the emergency is met, the FHA will work out with concurrence of lending institutions a set of regulations permitting the adjusting of mortgage terms at subsequent periods in the life of the project.*" [Italics added.]

Representations similar to those contained in the last quoted paragraph were made by other officials, as follows:

1. The Federal Housing Commissioner,[2] in a directive sent the Directors of all FHA field offices, dated January 2, 1947 wrote (Def. Ex. 1, Tr. 21-22, R. 134, 135):

"*Adjustment of Section 608 Mortgage Terms*

"So that housing projects constructed under the present emergency conditions may continue to maintain their competitive market position after the housing shortage is met, the Federal Housing Administration will, in collaboration with lending institutions, give consideration to a readjustment of project mortgage terms where it is deemed necessary."

2. This was followed by a similar directive by an Assistant Commissioner on January 7, 1947, also addressed to the Directors of all FHA field offices, directing reproduction and wide circularization of a letter addressed to "Architects, Realtors, Builders, Dealers, Manufacturers and Representatives of Financial Institutions, State of ," on "Rental Housing Program for Veterans" (Def. Ex. 2, Tr. 23, R. 138). Included in the latter circular was this paragraph (R. 141):

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[2] Pursuant to § 1 of the National Housing Act (12 U.S.C. § 1701; R. 216), all of the powers of the Federal Housing Administration are vested in the Federal Housing Commissioner.

"IV. FHA Financing of Rental Projects

1. *Section 608—Rental Housing*

• • • • • • • •

"e. Action has been taken to expedite the handling of requests for *prevailing wage determinations* by the Department of Labor and provisions made for the *adjustment of mortgage terms*, where it is deemed necessary in order that rental projects, constructed under the present emergency, may continue to maintain their competitive market position." [Italics in original.]

Mr. Curt C. Mack, Assistant Commissioner of FHA in Charge of Underwriting from 1940 to 1954 (R. 82-83), testified as to the reason for including the paragraph just quoted (R. 93):

"This addition was put in—in my opinion—to give some reassurance to developers that there would be opportunities for adjusts, for misanalyses, misappropriations, misappraisals of the mortgage • • • because at that time there were extraordinary demands for housing in areas that did not give evidence of likelihood of continuity. • • • I would like to change that likelihood to certainty of continuity. We wouldn't go into any area where there was no likelihood of continuity."

3. On the next day, the same Assistant Commissioner who had dispatched the letter of January 7, *supra*, p. 5, sent a similar circular letter to the Directors of all FHA field offices on the subject, "Meetings with Industry" (Def. Ex. 4, Tr. 23-24, R. 144 et seq.), with which was inclosed a voluminously documented "Suggested Pattern" for "Rental Housing Program for Veterans—Meetings with Industry." This covered advance arrangements and a suggested meeting program, as well as directions for newspaper publicity, invitational letters, charts and literature to be used at all meetings, and suggestions for interviews following the meetings.

Under the heading "Program for Community Meetings," the "Suggested Pattern" stated (R. 148):

> "(5) Stress investment feature as viewed from subsequent annuity."

Former Assistant Commissioner Mack said of that letter (R. 94-95):

> "A. Well, that, in my opinion, was the very crux of the rental housing stimulation program; at that time men who had been producing housing, had been producing limited housing under priority, as Judge Bailey has testified, and the production of rental housing property, which has its principal value in the future productivity of income, annual income called annuity, if you please, had not been in their field. There were a few large builders in the country as they have subsequently emerged during the last ten or so years. Builders were not thinking in terms of building things for future income. They were thinking in terms of building properties to sell, put the profit in their pocket and do it over again, and the effort there was to develop thinking and interest in the production of what was really a different type of realty than that which these people who were expected to be interested to produce it, had been producing."

Further (R. 95):

> "Q. I'm not talking about the bad management feature, but they'd never lose simply because of the lack of demand?
>
> "A. Well, that thinking was there and it expressed, in my language, as I recall it, as an employee and officer of the Administration, it was I am sure agreed among all of us, that every possible feasible and reasonable effort in negotiation and adjustment would be made in order to preserve the interest of the developers."

4. Inclosure No. 12 to the basic "Suggested Pattern for Industry Meetings" was a press release that contained this paragraph (R. 158):

> "In cooperation with lending institutions, FHA will give ready consideration in the future to readjustment of mortgage terms in order to enable projects built under present emergency conditions to maintain their competitive market position; this will involve rewriting mortgages in cases of decreased earnings."

5. In January 1947, the Federal Housing Administration issued a printed brochure headed "Rental Housing Under FHA" (Def. Ex. 5, Tr. 24, R. 174), which contained the following (R. 174, 175):

> "New incentives, speedier action, and increased financial stability are offered builders and sponsors of rental housing projects by recent changes in Federal Housing Administration procedures and policies. • • •
>
> "MORTGAGE REVIEW
>
> "In collaboration with lending institutions, FHA will give consideration to readjustment of mortgage terms if necessary in the future in order to enable projects built under present emergency conditions to maintain their competitive market position and afford protection against decreased earnings."

Former Assistant Commissioner Mack testified that all of these directives sent the Field Directors were considered by the FHA Executive Committee (R. 88) to be binding, that they were binding, and that they were subsequently followed (R. 98).

FHA's Field Operating Manual (Def. Ex. 9, Tr. 58, R. 184), as amended through March 1953 (Tr. 57-58), contained the following provisions concerning mortgage adjustment:

1. There was delegated to the Assistant Commissioner of Rental Housing (R. 85-86, 187-188) the power—

> "11. To approve the modification in the terms of, and authorize the foreclosure of, mortgages assigned to the Federal Housing Commissioner in exchange for debentures under Sections 207 and 608, Titles VII and VIII, and Section 908."

2. There was assigned to one of FHA's functional directors (¶149, R. 189):

> "Assistance to mortgagees and mortgagors in matters involving forebearance [*sic*] with respect to groups of mortgages incident to rehabilitation of projects and in refinancing programs."

3. Also (¶154, R. 191):

> "Formulation of recommendations of the Insuring Office Director with respect to modification of project mortgages, adjustments in rent schedules, changes in charter, substitution of mortgagors, release of portions of security, diversion of replacement reserves, defaults, establishment of receivership, assumption of control of projects and other protective measures and the assignment of mortgages to the Commissioner."

B. Specific representations in present case.

Judge H. E. Bailey, State Director of FHA in South Carolina from 1934 to 1952 (R. 70), on January 9, 1947, acting pursuant to the directions he had received from his Washington superiors (*supra*, p. 5), mailed to "Architects, Realtors, Builders, Dealers, Manufacturers and Representatives of Financial Institutions, State of South Carolina" the Washington-prepared FHA circular letter on "Rental Housing Program for Veterans" that contained the paragraph "e" concerning mortgage adjustments that has already been quoted at p. 6, above (R. 75-76; Def. Ex. 8, Tr. 37-39, R. 179, 182).

A little earlier, in December 1946, Judge Bailey and FHA officials from six other States (Tr. 32) had attended a closed FHA zone meeting in Birmingham, Alabama, that was in substance a school to teach FHA officials how to promote rental housing projects under Section 608 (R. 72-74). At this meeting, a question was asked "what would happen in the event the project became unsuccessful" (R. 73-74), and the answer (R. 74) was that "If the project got in

default due to the lack of tenants, the Government would negotiate it or modify it or assist the sponsors in some way to work the deal out in a satisfactory manner to everybody concerned."

Pursuant to the instructions received from his superiors in FHA, Judge Bailey as State Director caused a meeting to be held at the Columbia Hotel in Columbia, S. C., on January 15, 1947 (R. 76, 81, 99, 103, 108, 112, 124, 127).

The representations made by FHA officials at that meeting were testified to by seven individuals, three of whom were connected with FHA at the time.

Allison, a former FHA official (R. 98), testified that an FHA representative there stated (R. 100) "That in case of trouble due to not sufficient income, that it would be reworked and the terms would make it easier for them to continue the ownership."

Baxter, another former FHA official (R. 103), said that "the statement was made that the Commissioner would hold a preferred share of stock, so that his interest would be that he could, if the project got into trouble, take it over until such time it could be rehabilitated and returned to the former owners."

And Judge Bailey, the State Director, said that at each of his conferences the question came up (R. 78-79), and that (R. 79), "I gave them the same interpretation, that if the mortgage got in default or in difficulty due to the lack of occupancy, the Administration would negotiate either for longer terms, modify it or recast the mortgage in some manner or form satisfactory to the sponsors, to the Commissioner and the others concerned." This interpretation was known to his superiors (R. 80) and was never criticized by them (R. 79, 80).

Outsiders, also, testified to hearing those representations at the January 1947 meeting in Columbia (R. 108, 110-111, 124-125, 127-128). Specifically, Rudolph C. Barnes, Esq.,

a stockholder, officer, and director of, and attorney for, petitioner (R. 112), testified that he had received (R. 113) the letter from the State Director (Def. Ex. 8, R. 179, 182) which stated that provisions had been made for the adjustment of mortgage terms. Mr. Barnes also testified that he attended the Columbia meeting and heard the interpretations and representations as to mortgage adjustments made by the FHA officials (R. 114-115); that he believed the FHA letter and the representations made by the FHA officials at the meeting; and that he acted thereon and advised his clients accordingly. (R. 115-117, 121-123.)

After hearing the testimony, the Master found (R. 24):

> "* * * there is no question in my mind that the President, the Commissioner and the State Directors [*sic*] of the Housing Administration did all the things that the defendant [petitioner here] claims they did to entice the financiers, contractors and others into Federal Housing, and that the promoters of defendant were included among those who were persuaded to come in. The defendant has, however, failed to convince me that there ever existed any other obligation than to give reasonable consideration to a modification of the mortgage terms."

The Master's report was adopted by the District Court (R. 56).

C. Facts relating to present project.

Petitioner was incorporated in South Carolina on April 12, 1949, under a standard FHA form of charter drawn by FHA (R. 118-119; Def. Ex. 16, Tr. 140, R. 120, 205-215).[3] Petitioner was capitalized at $50,100, with 500 shares of common stock of a par value of $100, and one hundred shares of preferred stock, par value $1 per share; all of

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[3] Petitioner's application for mortgage insurance (Def. Ex. 13, Tr. 134-135) had been prepared earlier; it is dated November 18, 1948.

the preferred stock was held by FHA (Def. Ex. 16, "Fifth," at R. 206-208). The number of shares of common stock originally issued was 259 (Tr. 145, 151), based on the value of the land (Tr. 150).[4]

Petitioner furnished FHA with full particulars concerning its project, including the names of its stockholders and the amount of their holdings (Tr. 139; Def. Ex. 15, Tr. 139 [not printed]). Petitioner applied for mortgage insurance (Def. Ex. 13, Tr. 135 [not printed]), and FHA made a commitment for mortgage insurance in the amount of $1,256,100 (Def. Ex. 14, Tr. 138, R. 200-204). On May 5, 1949, petitioner borrowed that amount from the Wachovia Bank & Trust Co. of Winston-Salem, N. C., secured by a note and a mortgage on its property (R. 25-26). The amount of the mortgage was based on the figure determined and fixed by FHA in the construction contract (Tr. 151; Def. Ex. 19, Tr. 164 [not printed]) viz., $1,167,196 (Tr. 163), the excess being applied to stated amounts, also fixed and determined by FHA, for builder's, architect's and attorneys' fees, plus expenses for financing, title, and recording (Tr. 152).

Woodland Terrace itself is a multi-building garden type project in the vicinity of Fort Jackson, Columbia, S. C., and, being opened building by building, was able to earn rentals during the allocated construction period (Tr. 141, 153-154). With the proceeds of the advance rentals that were received before the first monthly payment became due, petitioner purchased 222 shares of its outstanding shares at par, leaving 37 shares of common outstanding (Tr. 154-160). This was before any mortgage amortization was required (Tr. 160), no part of the money paid for these shares came from the proceeds of the mortgage (Tr. 161), that stock is still in petitioner's treasury (Tr. 163), and

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[4] FHA had instructed its field offices to say at community meetings (R. 148), "Remember that every suitable site is the basis of a rental housing project. If you have the site you have a deal."

petitioner filed with FHA annual reports reflecting its purchase (Tr. 156). FHA never questioned the propriety of this purchase (Tr. 203).

For a number of years, the project had virtually no vacancies, and was profitable (Tr. 142). In November 1953, a dividend of $46,250 was paid, leaving $12,000 in the corporate treasury, and in October 1955, two years later, another dividend of $14,800 was paid, leaving $17,000 (Tr. 201-203, 143-144). Each time, in conformity with the terms of petitioner's corporate charter, FHA was similarly paid a dividend on its preferred stock (Tr. 202). FHA was fully informed (Tr. 202-203), and FHA never questioned petitioner's corporate acts (Tr. 203).

During this period, petitioner also paid FHA $45,000 in mortgage insurance premiums (R. 118-119).

About May 1956, however, substantial vacancies occurred, in part because of a reduced complement at Fort Jackson, in part because of competition from the sale of homes with little or no down payments, which "completely broke the apartment rental market" (R. 196-197).

Accordingly, petitioner was unable to meet its April 1, 1957, mortgage payment, and on May 28, 1957, it requested that FHA give it a "work-out arrangement" (Def. Ex. 10, Tr. 118-119, R. 195-197).

On June 13, 1957, the South Carolina office of FHA advised petitioner that "our Washington Office informs us that we cannot make a commitment until the mortgagee has made its election to assign the mortgage or commence action to acquire and tender the property to the Commissioner" (Def. Ex. 11, Tr. 118-119, R. 198). On July 12, 1957, after an intervening assignment, the mortgage was assigned to the Federal Housing Commissioner, who in turn assigned it to the United States (R. 27).

Meanwhile, on June 27, 1957, some two weeks before the mortgage was assigned to FHA (R. 27), petitioner was

notified by FHA's South Carolina office that "we are advised by our Washington office that they have decided to send the case to foreclosure immediately upon assignment" (Def. Ex. 12, Tr. 118-119, R. 199).

The evidence shows that petitioner's attorney conferred with FHA officials in Washington endeavoring to avoid foreclosure (Tr. 165-183, 194-200), but to no avail, even though he offered to pay $125,000 that the stockholders had raised (Tr. 165-168). He was told that the early purchase of treasury stock was a charter violation (Tr. 169), that it was somehow wrong for the stockholders to have made a profit (Tr. 166-167), and that, although FHA had never complained over a 6 or 7 year period of an identity of interest between petitioner's stockholders and the stockholders of the builder of its project (Tr. 172-173), this constituted an improper conflict of interest (Tr. 167-168) under 24 C.F.R. (1959 ed.) §232.25 (Tr. 199-200; *infra*, Appendix C, p. A12), which was adopted some years after the present project was commenced (Tr. 200).[5]

The record shows that FHA made the following representations in respect to profits when the rental housing program was being pushed early in 1947:

1. State Directors' draft letter to architects, realtors, builders, dealers, manufacturers and representations of financial institutions (Def. Ex. 2, R. 138, 139, 141):

> "f. In both large and small communities the attention of equity investors is invited to the attractive investment possibilities in the ownership and management of rental projects."

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[5] 24 CFR § 232.25 first dealt with "Form of contract" when promulgated on August 19, 1954 (19 Fed. Reg. 5256, 5260). It was amended on November 25, 1954 (19 Fed. Reg. 7602, 7604) and again on July 3, 1957 (22 Fed. Reg. 4688). Before 1954, the section numbered § 232.25 dealt with "Title evidence" (1949 ed. of 24 CFR) and with "Certificate of mortgagor regarding racial restrictions" (1950 Cum. Supp. to 24 CFR).

2. Suggested program for community meetings with industry, sent to all State Directors (Def. Ex. 4, at R. 148):

> "(5) Stress investment feature as viewed from subsequent annuity. • • •
>
> "(8) Don't make it tough; make it easy."

3. "Suggested Talk," a part of "Suggested Pattern for Industry Meetings" (Def. Ex. 4 at R. 154-155):

> "In addition to meeting the housing requirements of Veterans, Rental Housing creates steady employment for labor; it affords profitable operations for builders; it provides steady income for sponsors; it gives mortgage lenders sound long-term investments; and it benefits the community as a whole by neighborhood stability. • • •
>
> "Equity investors in rental housing can expect a fair return on their investment during the life of the mortgage and at the end of the amortization period should realize a well-maintained income producing property free and clear of the mortgage debt. • • •
>
> "With an insured mortgage loan up to 90% of necessary current cost, an efficiently operating sponsor-builder may recover through the mortgage substantially all of his cash expenditures. • • •
>
> "As a further incentive to sponsor-builders in establishing initial rentals, FHA authorizes an anticipated net return of 6½% with a 7% vacancy allowance. Under Title VI as such, there is no limit to amount of dividend or rate of return."

D. The present proceeding and the rulings below.

The present action was commenced on January 17, 1958 (R. 25).

A receiver was appointed and is now managing the properties (Appendix A, *infra*, p. A2). The amount due on the mortgage note on May 4, 1959, was $1,191,313.93, re-

flecting a credit of $36,919.37 for cash and bonds in petitioner's reserve for replacements (R. 27-28).[6]

The Master, after finding that FHA had induced petitioner's organizers to embark upon the project, held that FHA was neither a holder in due course nor an innocent purchaser for value (R. 23). However, he went on to hold that the most that the representations amounted to was that FHA was authorized but not required to adjust the mortgage; that its direction not to adjust was not judicially reviewable; and that, in any event, to vary the terms of the mortgage by FHA's obligation to modify would involve a violation of the parol evidence rule (R. 33-35). He therefore recommended a decree of foreclosure (R. 35-36). Despite lengthy objections (R. 36-55), the Master's Report was adopted in its entirety by the district court (R. 55-56), which decreed foreclosure, with provisions for a deficiency judgment (R. 57-60).

The court of appeals affirmed. It held (*infra*, pp. A1-A10) that the interpretations and representations made by the FHA related to its procedural requirements only and that there was no relinquishment of the right to foreclose; that if there were any representations that the FHA would take over defaulting projects for the benefit of stockholders such representations were in conflict with the terms and intent of the statute; and that, despite the failure of Section 608 to incorporate Section 207(l), any assignment of the mortgage to the United States carried with it a right to a deficiency judgment.

REASONS FOR GRANTING THE WRIT

When the United States creates an agency for commercial operations with a "sue and be sued" clause, then, under principles heretofore enunciated by this Court (*Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306

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[6] This was the reserve established for repairs, etc., to offset depreciation (Tr. 145).

U.S. 381; *Federal Housing Administration* v. *Burr*, 309 U.S. 242), that agency is so far stripped of basic sovereign immunities as to be treated like any other business unit. There is no question here of any vestigial disparities of sovereignty, such as freedom from State statutes of limitations (e.g., *United States* v. *Summerlin*, 310 U.S. 414) or the like. Nor is any effort being made here to hold the United States or its officers to "the punctilio of an honor the most sensitive" (Cardozo, Ch. J., in *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546). The question rather is whether in the present proceeding, wherein it is invoking the processes of a court of equity to foreclose a mortgage, the United States must abide the far less exacting standard of "the morals of the market place" (*ibid.*), in a situation where it is neither a holder in due course nor an innocent purchaser for value (R. 23).

The principles brought into question by this petition are not unique to Woodland Terrace, but affect many thousands of mortgages still outstanding. At the end of 1959, the latest year for which information is available,[7] there was outstanding in respect of more than 5000 projects constructed under §608 a mortgage debt of $2,805,796,000, representing 373,477 units of housing, and somewhere over 5000 individual mortgages. FHA, *26th Annual Report for the year ending December 31, 1959*, pp. 17, 37, 51.[8] Moreover, since FHA foreclosures and property acquisitions are now on the rise (*id.*, p. 46), the intrinsic public importance of the questions here presented is actual rather than merely potential.

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[7] FHA's 26th Annual Report, for the year ending December 31, 1959, was not received in this Court's Library until nearly a year later, on December 2, 1960.

[8] The last figure is only approximate, because the Report's figure of 5730 mortgages in force (p. 51) is applicable to Sections 608-610 of the Act without further breakdown.

First. As has been pointed out (*supra*, pp. 4-8, 9-11), the officers of the United States, beginning with the President, represented to those who were being induced to build emergency rental housing for veterans that their mortgages would be adjusted if project earnings decreased, a possibility that was anticipated; FHA's own regulations designated the officers who were to handle mortgage adjustments (*supra*, pp. 8-9); and the Master and the District Court found as a fact that petitioner and its sponsors had been induced by those representations to embark on the project (R. 24, 56).

We pause to point out that the representations here (*supra*, pp. 4-8, 9-11) plainly related to substance; there is not the slightest warrant in the present record for the holding below (*infra*, pp. A5-A6) that they dealt simply with procedural matters. Moreover, Presidential representations are entitled to more weight than mere puffing emanating from overexuberant underlings, see *United States* v. *Murff*, 260 F. 2d 610 (C.A. 2) (President's message regarding Hungarian refugees given effect in deportation proceeding against such a refugee). Nor is it material that two years intervened between the representations and petitioner's start on the project (Appendix A, *infra*, p. A6). The record shows that in South Carolina it was difficult to get the program under way at all (R. 81), and it is a fact that, throughout the entire country, nearly two thirds of the Section 608 program came in 1949 and 1950 (*FHA, 26th Annual Report, supra*, p. 18).

At the very least, as both courts below held (Fdg. 15, R. 33; Appendix A, *infra*, p. A5), "these representations gave assurance of consideration of requests for modification of the terms of mortgages in appropriate cases * * *."

That being so, the FHA was required to give fair consideration to petitioner's request for a "work-out arrangement" (R. 197), an obligation in no sense satisfied by the arbitrary *nyet* made in reply (R. 199). Here, all too plainly, fair consideration was not given; no reasons for

rejecting petitioner's request were set forth in FHA's correspondence,[9] the United States introduced no evidence to support the turn-down, and neither the Master nor the District Court made any findings as to the facts underlying FHA's brusque rejection of petitioner's application for adjustment. Indeed, *non constat* footnote 2 of the opinion below (Appendix A, *infra*, p. A3), on this record the equities strongly favored petitioner:

1. Petitioner had paid FHA $45,000 in mortgage insurance (R. 118-119), and there had been an offer to pay $125,000 additional (Tr. 165-168); the record suggests that this offer may have related to several projects (*id.*), but the court below considered that only petitioner's project was affected (note 2, p. A3, *infra*). The Master made no findings on the point. But if even only a ratable portion of the $125,000 was attributable to petitioner, that portion plus the premiums assuredly outweighed the $61,050 that had been paid out as dividends over the life of the enterprise (Tr. 143-144, 201-203), or even the aggregate of $83,250 representing dividends plus the retirement of 222 shares of common stock (Tr. 157-160).

2. FHA was at all times informed of the above transactions, receiving its own dividends at the time (Tr. 156, 202-203), and never at any time prior to the default questioned any of petitioner's corporate acts (Tr. 203).

3. As the Second Circuit held, affirming the Tax Court (*Commissioner* v. *Gross*, 236 F. 2d 612, affirming 23 T.C. 756), petitioner's retirement of its stock represented a distribution of capital that was taxable as a capital gain rather than as a dividend. Moreover, since the stock was

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[9] The FHA's own Field Operating Manual provided in Sec. 302 that (R. 192) "Letters going out from the Federal Housing Administration represent official messages of the United States Government, and those responsible for the preparation of correspondence should keep this fact in mind."

retired out of current earnings (Tr. 141, 153, 154-160), there was no "windfall" distribution to stockholders from the surplus proceeds of the mortgage (Tr. 161), as was the case in *Loftus* v. *Mason*, 240 F. 2d 428 (C.A. 4), certiorari denied, 353 U.S. 949.

4. When FHA promoted the emergency rental housing program now in question it simply lumped owners and builders together as "sponsor-builders" (Def. Ex. 4 at R. 155; and see *id.* at R. 154, 169, 174). Specifically, the identity of interest between petitioner and its builder was disclosed to FHA at the outset (Tr. 172-173; Def. Ex. 15, Tr. 139; Def. Ex. 19, Tr. 164). On neither score, therefore, could that relationship be retroactively condemned by a §207 regulation adopted five years later, even assuming that this regulation (24 CFR [1959 ed.] §232.25), which was first adopted in August 1954 (see note 5, p. 14, *supra*), could be deemed applicable to §608 projects in any event.[10]

5. Certainly, in view of the inducements on which petitioner relied at the outset (R. 24), inducements that held out glowing prospects of investment possibilities (*supra*, pp. 14-15), it was not open to FHA years later to decry the making of profits (Tr. 166-167). Indeed, without some such profit-making inducements the program could not have been got under way. See Remington, *The Veterans Emergency Housing Program*, 12 Law & Contemp. Prob. 143, 146.

Second. On this record, therefore, it was plainly inequitable for the courts below to decree a foreclosure. There is here no question of affirmative action by a private party seeking to control, by way of judicial review, a matter

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[10] 24 CFR (1949 and 1959 eds.) § 282.19, relating to § 608 projects, specifically provided that while the Commissioner might amend the regulations in that part, "such amendment shall not affect the contract of insurance on any mortgage already insured or any mortgage or prospective mortgage on which the Commissioner has made a commitment to insure."

committed to agency discretion as in *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, relied on by the Master (R. 33) and the District Court (R. 56); rather, here the Government's inequitable exercise of its discretion, assuming it had any to exercise, is asserted as a defense to its invocation of the chancellor's assistance in a foreclosure proceeding.

Similarly, we fail to see why or how petitioner's defense calls into question the parol evidence rule. For one thing, the substance of the representations here relied upon was contained in other written instruments (Def. Ex. 1, 2, 4, 5, 8; *supra*, pp. 4-8, 9). For another, the contention that the United States on receiving an assignment of the mortgage is bound by its own prior inducing representations not to enforce that instrument's literal terms no more involves a violation of the parol evidence rule than does the doctrine that a beneficiary who has killed a testator or an insured cannot benefit although duly named in the will or the policy to take upon the latter's death. *New York Mut. Life Ins. Co.* v. *Armstrong*, 117 U.S. 591, 600; *Riggs* v. *Palmer*, 115 N.Y. 506, 22 N.E. 188; Cardozo, *The Nature of the Judicial Process*, 40-43; Ames, *Can a Murderer Acquire Title by His Crime and Keep It?* in *Lectures on Legal History*, 310. In all of these situations, a court of equity prevents the apparent beneficiary from enforcing what is written in the bond.

Third. Since, as this Court has held, FHA by virtue of the "sue and be sued" clause descended from the Olympus of immunity to mingle with mere mortal entities in the marts of commerce (*Federal Housing Administration* v. *Burr*, and *Keifer & Keifer* v. *Reconstruction Finance Corp.*, both *supra*), then, as the preferred stockholder in petitioner, controlling the corporation both by virtue of the latter's charter (¶ Seventh (*e*), R. 210-211) and of its own regulations (24 CFR [1949 ed.] §280.29), FHA was a fiduciary, bound to exercise its broad powers for the benefit

of all of the interested parties. *Pepper* v. *Litton*, 308 U.S. 295. Without laboring the point at this juncture, it was bound at the very least to hold the balance even between the stockholders who had been induced to invest in the project, and FHA itself, which had made the inducements and which had taken over the now delinquent mortgage. It could not, having regard to its fiduciary obligation as the sole preferred stockholder, disregard petitioner's equities, wipe out petitioner's investment, and wind up with a deficiency judgment that, on the basis of prior experience in the same State, might amount to as much as 90% or more (R. 120) of the accelerated principal and interest on a mortgage that on the day before default still had over 25 years to run (R. 26). Whether, as contended below, FHA was bound to take over and operate the project for the stockholders' benefit, need not now be explored at length; but, assuredly, on the present record we submit that this question is not disposed of by merely citing (R. 34; Appendix A, *infra*, p. A6, note 6) *United States* v. *Anderson Apartments, Inc.*, 114 F. Supp. 69 (W.D.S.C.), where there do not appear to have been representations of the character found (R. 24) to have been made here.

Fourth. What adds injury to insult here is that the United States, after inducing investors to enter into the Veterans' Emergency Housing Program by making fulsome representations of profits plus assurances of mortgage readjustment in the event of deficits, has now obtained not merely a decree of foreclosure but also a provision for a deficiency judgment if, as other experiences in the same State indicate, the property when sold on foreclosure may realize "as low as 5¢ and 10¢ and 20¢ on the dollar" (R. 120). Petitioner submits that such a result is justified neither by the law nor by the principles of that equity whose aid the United States is invoking.

By 1942, when §608 of the National Housing Act was first enacted (§11 of the Act of May 26, 1942, c. 319, 56 Stat.

301, 303), Congress was certainly aware of "the economic ills induced by the inflexible payment mortgage" (Wickens, *Adjusting the Mortgagor's Obligation to Economic Cycles*, 5 Law & Contemp. Prob. 617, 621), and must be taken to have had in mind the decisions of this Court sustaining legislation that outlawed deficiency judgments and limited mortgagees on foreclosure to the amount of the debt as evidenced by the fair value of the property. *Richmond Corp.* v. *Wachovia Bank*, 300 U.S. 124; *Honeyman* v. *Jacobs*, 306 U.S. 539; *Gelfert* v. *National City Bank*, 313 U.S. 221. Consequently when, in enacting §608(f), Congress incorporated by reference §207(k), which authorized foreclosure to acquire title to the property, and did not similarly incorporate §207(l), which authorized deficiency judgments, it must be taken to have precluded a grant of the latter power. *Expressio unius exclusio alterius.*

It is true that the legislative history is unilluminating (H.R. Rep. 2039, 77th Cong., 2d sess., pp. 2, 10; S. Rep. 1300, 77th Cong., 2d sess., p. 2), but we think that "this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute," *Greenwood* v. *United States*, 350 U.S. 366, 374. This is particularly so here, where the FHA regulations applicable to §608 projects say nothing of deficiency judgments and contemplate simply acquisition of the property in the event of foreclosure. See 24 CFR (1949 ed.) §§280.10, 280.18, 282.10, 282.12, 282.14, set out in Appendix C, *infra*, pp. A13-A15.

The court below (Appendix A, *infra*, pp. A8-A10) disregarded the regulations, and gave no effect whatever to Congress' deliberate exclusion of §207(l) from the scope of §608.

We think, therefore, that there was no power to provide for a deficiency judgment. But, at the very least, the courts below should have heeded petitioner's "appeal to the chancellor in specific cases to prevent the machinery

of judicial sales from becoming an instrument of oppression" (*Gelfert* v. *National City Bank*, 313 U.S. 221, 232), so that the decree would in any event provide that no deficiency judgment could be had if the fair value of the property was equal to or more than the amount of the mortgage debt.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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